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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES P. SUTHERLAND,
Petitioner,

v.

BRONTE C. SUTHERLAND,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Contract Clause, U.S. Constitution, Art. I, § 10, shall be interpreted in accordance with the historical evidence of its original understanding, as prohibiting state legislation that enables non-consensual, retroactive impairment of a marital contract when that contract was entered into prior to the enactment of the state legislation.

Whether the Contract Clause creates a "federal common law" of contracts that authorizes courts to exclude from the purview of the clause categories of agreements that a State's civil code expressly identifies as contract conferring legally enforceable rights and obligations.

Whether there are procedural Due Process limits, required by the Fourteenth Amendment, § 1, on the substantive criteria a state may adopt and implement for the granting of a divorce against a non-consenting spouse, married before the law's enactment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James P. Sutherland respectfully petitions for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Six.

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. A) was ordered not to be published. The order of the California Supreme Court denying review (Pet. App. D) is not reported. The decision of the California Superior Court (Pet. App. E) is not reported.

JURISDICTION

The decision of the California Court of Appeal was entered on July 9, 1991 (Pet. App. A). That Court modified its opinion and denied Petitioner's timely petition for rehearing on August 6, 1991 (Pet. App. B). The California Supreme Court denied review on September 25, 1991 (Pet. App. D) and the judgment of the Court of Appeal therefore became final on October 1, 1991 (Pet. App. C). On December 12, 1991, Justice O'Connor extended the time for filing this petition to January 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). 28 U.S.C. § 2403(b) may be applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant Constitutional and statutory provisions are set forth in Pet. App. G.

STATEMENT OF THE CASE

> "When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire, whether such an act be constitutional." Chief Justice John Marshall, *The Trustees of Dartmouth College v. Woodward*, 4 17 U.S. (4 Wheat.) 518 (1819).

A. Introduction

The legislative act foreseen by Chief Justice John Marshall in 1819 as being susceptible of this Court's review has only recently occurred. Through retroactive application of no-fault divorce laws, one party to a marriage can unilaterally terminate his or her marriage contract without consent or cause. While such laws are proving inimical to family interests and public policy, the present case affords this Court the opportunity to restore important constitutional safeguards protecting fundamental marital rights of parties married before California adopted its no-fault divorce law, the 1969 Family Law Act.[1] The Court has long dealt with domestic law issues when those issues implicate important constitutional concerns.[2] This is such a case.

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[1] *See* Pet. App. G. The term "no-fault" is used here to refer to marital dissolution laws that provide for proceedings in which courts terminate the marital contract without reference to breach.

[2] *See Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *Davis v. Beason*, 133 U.S. 333 (1890) (bigamy); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parental rights); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parental right to direct children's education); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital privacy); *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (access to divorce courts); *Stanley v. Illinois*, 405 U.S. 645 (1972) (parental custody); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); *Santosky v. Kramer*, 455 U.S. 745 (1982) (natural parents' due process right to custody hearing); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (presumptive paternity).

This case asks this Court to adjudicate a domestic relations matter only insofar as it raises constitutional issues. It is thus distinguished from those cases that view domestic relations law as the sole province of the states. *See Sosna v. Iowa*, 419 U.S. 393 (1975); *Simms v. Simms*, 175 U.S. 162 (1899); *Pennoyer v. Neff*, 95 U.S. 714 (1878); *Barber v. Barber*, 21 How. 582 (1858). This case also does not implicate the concerns raised by Chief Justice Rehnquist in *Santosky v. Kramer*, 455 U.S. 745 (Rehnquist, C.J. dissenting), in that the California does not intend to secure a hearing for nonconsenting spouses; far from providing a plethora of procedural protections, California provides no legal procedure that effectively protects a spouse who does not agree that the marriage is irreconcilable.

This case involves the retroactive application of the 1969 Family Law Act's "no fault" divorce provisions to dissolve a pre-1969 marriage, by granting dissolution upon the unilateral affirmation and unsupported testimony of one party to "irreconcilable differences." [3]

In 1990, the Superior Court, in and for the County of Santa Barbara, applied California's no-fault divorce law, to terminate petitioner James P. Sutherland's marriage to his wife, respondent Bronte C. Sutherland, over his objection that his 27-year marriage was reconcilable.[4] California treats marriage as a civil contract by statute. Accord Pet. App. A, at 2a "[Husband] correctly points out that marriage is, by statute, a civil contract." California Civil Code §§ 4100, 5100. *See* Pet. App. G. However, decisional law excludes marriage from "contractual rights and obligations within meaning of Article I, section 10 of the United States Constitution." *See Marriage of Walton*, 28 Cal. App. 3d 108, 112 (1972). California's 1969 Family Law Act provides that a marriage may be dissolved when a party generally pleads that there are "irreconcilable differences, which have caused the irremediable breakdown of the marriage." California Civil Code § 4506 (Deering 1989). Significant for the present case, the law requires courts to rule as improper and inadmissible any evidence of specific acts of misconduct ("except where child custody is in issue and such evidence is relevant to that issue"). California Civil Code § 4509, amend. 1975. Pet. App. G.[5]

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[3] There are more than 100,000 California divorces a year. See Weitzman, *The Divorce Revolution*, 3, n.9 (1985); *1990 World Almanac*, 834. Weitzman interviewed 44 California family law judges and commissioners; none had ever denied a petition for dissolution. *See supra*, xix and 10.

[4] Notably, his wife agreed at the hearing he had at "no time indicated other than the desire to reconcile." See RT, p. 6; l. 13. Citations to the court reporter's transcript of the trial court proceedings will be denoted as ("RT"). Citations to the clerk's transcript will be denoted as ("CT").

[5] Former California Civil Code § 92, enacted in 1872 and last amended in 1941, provided that divorces were granted only for

Notwithstanding the important fact that the parties married years before the no-fault law took effect, the constitutional interests James has in his marriage as contract were subverted by conflict between statutory and decisional law, and the Court of Appeal's dutiful reliance upon, and deference to, the words of Justice Stephen Field in a key Supreme Court decision, *Maynard v. Hill*, 125 U.S. 190, 31 L.Ed. 625 (1888). *Maynard* plainly and materially misconstrued the meaning of what Chief Justice John Marshall and Justice Joseph Story had said in *Trustees of Dartmouth College v. Woodward*, 4 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), about constitutionally protected interests in marriage as contract.

The present case comes before the Court with serious, and likely recurring, constitutional questions of fundamental importance to the parties and to persons in each of the 50 states, all of which now have no-fault divorce laws.[6]

B. The Facts

James and Bronte Sutherland were married on December 31, 1962. Solemnization was religious. The parties publicly exchanged bilateral vows. Each party promised the other:

> I take you for my lawful (spouse), to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, until death do us part.

Five sons were born of the marriage (RT p. 7, l. 21-25). Two are yet minors, born in 1974 and 1977.

In 1988 Bronte Sutherland instituted an action for Dissolution of Marriage. That action was settled by entry

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specific causes: adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance, conviction of a felony, and incurable insanity.

[6] Wardle, "No-Fault Divorce and the Divorce Conundrum," 1991 B.Y.U. L. Rev. 79, 87-91; see also Glendon, *The Transformation of Family Law: State, Law and Family in the United States and Western Europe*, 188-196, 227-238 (1989).

of a stipulated judgment of legal separation on April 6, 1989. However, on January 2, 1990, Bronte filed a petition for dissolution. James filed a response, contending that there was a reasonable possibility of reconciliation. Bronte testified to "irreconcilable differences" and an unwillingness on her part to participate in any counseling. Her attorney argued that the law required no further hearing (RT, p. 2, l. 13-25). When James' attorney characterized the hearing consisting of only Bronte's uncross-examined testimony as "unilateral," the court interrupted, warning,

> I'm not going to waste very much time on this, because I disagree with that 100 percent. It's virtually a presumption of irreconcilable differences. When one of the parties gets up there and says, "I don't want to live with him anymore—" (RT, p. 4, l, 13-18).

The court then reluctantly allowed a very brief cross-examination of Bronte and very brief testimony by James. The court denied his attorney's request to argue the constitutionality of the "no-fault" principles of the Family Law Act (RT, p. 16, l. 2-5). Bronte was asked if James had ever expressed anything but a "sincere and heartfelt and unequivocal desire to reconcile. . ." She replied, "He has in [sic] no time indicated other than a desire to reconcile." (RT, p. 6, l. 1-14). The court granted Bronte's petition for judgment of dissolution of marriage. *See* Pet. App. E.

C. The Decision of the Court of Appeal.

The California Court of Appeal affirmed. *See* Pet. App. A. The court noted that petitioner "correctly points out that marriage is, by statute, a civil contract" under applicable California law governing his marriage but rejected petitioner's contention that the 1969 Family Law Act violated the Contract Clause by impairing obligations created under the marriage agreement as governed by law at the time of the marriage. The Court of Appeal acknowledged *Maynard*'s error by saying, "This may be

true, but *Maynard*, nevertheless, is the supreme law, and that decision controls here. (U.S. Const., art. VI, cl. 2.)." *See* Pet. App. A, at 3a. The appellate court was bound by precedent and could not correct a mistake of the Supreme Court, no matter how significant or grievous to a party's constitutional interests in their marriage. It rightly understood itself to be controlled by *Maynard* as the supreme law, holding that marriage is not a contract within the meaning of the Contract Clause. *See* Pet. App. A at 3a. The court, therefore, held that, "[a]lthough *Maynard* did not involve application of no-fault divorce law, we perceive no reason to believe a contemporary marriage contract would fall within constitutional purview." *See* Pet. App. A at 2a-3a.

The Court of Appeal treated the due process issue with nearly undisguised disdain. According to the appellate court, James had his day in court, because he had been afforded the opportunity to say that he thought his marriage was salvageable.

The California Supreme Court denied review. *See* Pet. App. D.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS CONTRARY TO THE ORIGINAL MEANING OF THE CONTRACT CLAUSE, AND RELIES ON THIS COURT'S ERRONEOUS DECISION IN *MAYNARD v. HILL*, 125 U.S. 190 (1888), ESTABLISHING A FEDERAL COMMON LAW OF CONTRACTS GOVERNING THE SUBJECTS OF MARRIAGE AND DIVORCE.

This case affords the Court an important opportunity to restore the original understanding of the Contract Clause of the Constitution, U.S. Const. Art. I, § 10, cl. 1, as a prohibition of all state legislation that retroactively impairs vested contractual rights. Further, this case presents an opportunity to correct an error of long standing that has treated the clause as in effect creating a "federal common law" of contracts governing the area of marriage and divorce, preventing states from affording permanent

legal protection to the institution of marriage through its law of contracts.[7]

The court below, relying on this Court's decision over one hundred years ago in the case of *Maynard v. Hill*, 125 U.S. 190 (1888), held that California was precluded, as a matter of federal law, from according petitioner's marriage to respondent the status of a legal contract for purposes of the Contract Clause, *notwithstanding the fact that statutory law at the time of the marriage treated such marriage as a binding contract with legally enforceable rights and obligations.* The court below thus held that a later state law retroactively abrogating previous legal rights and obligations under such a contract posed no constitutional question under the Contract Clause.

The decision below is manifestly contrary to the plain, unequivocal language of the Contract Clause ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ") and to historical evidence of its original meaning. Properly construed, the Contract Clause prohibits all state legislation that retroactively impairs vested contractual rights. *See* Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L. Q. 525 (1987). Regrettably, this Court has in recent years abandoned the original meaning of the clause in favor of a variably-weighed ad hoc "balancing" test in which judges are asked to weigh the extent of the impairment of vested contractual obligations against the judge's assessment of the importance of

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[7] We note that the first question here—whether the original meaning of the Contract Clause should be restored—is also presented in a case currently pending before this Court. *General Motors Corp. v. Romein*, No. 90-1390 (argued December 10, 1991). There are certain differences between the facts of that case and this one which may cause the question presented not to be fully resolved in the *Romein* case. In addition, this case presents Contract Clause issues going beyond those presented in *Romein*. We submit that the instant case merits this Court's review regardless of how *Romein* was decided; and that, in any event, the issues presented here are not less important than the issues which caused this Court to grant review in *Romein*.

the policy interests a State seeks to advance through retrospective legislation. The result has been a confusing and unprincipled body of jurisprudence. Equally regrettable, the Court has, at least since its decision in *Maynard v. Hill*, interpreted the Contract Clause as if it created a "federal common law" of contracts, authorizing federal courts to determine that certain agreements between private parties should not be recognized as legally enforceable contracts, notwithstanding the fact that the applicable *state* law governing the private agreement at the time of its making treated the agreement as a contract giving rise to legally enforceable rights and duties.

Petitioner's position with respect to the Contract Clause issue is, first, that the Contract Clause prohibits state legislation that retroactively impairs vested contractual rights and duties. This is the natural reading of the language of the clause, its original understanding, and its consistent interpretation for the first 150 years of the Constitution. There is no justification for reading the clause as inviting judicial "balancing" of the impact of the impairment on contracting parties against a state's policy interests in creating such impairments.

Second, the Contract Clause does not create a federal common law of contracts that arbitrarily *excludes* from the clause's protection a given class of agreements—such as marriage—*that a State's substantive law has previously accorded the status of a contract, with legally enforceable rights and obligations of both parties.* While the word "contracts" in the clause necessarily has an irreducible federal law meaning which states cannot avoid simply by labelling contractual arrangements as something other than contracts, *see, e.g., Indiana* ex rel. *Anderson v. Brand*, 303 U.S. 95, 100 (1938); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), the Contract Clause, when properly construed, reaches *at least* all agreements that the applicable state substantive law of contracts considers to be legally binding contracts creating vested rights and duties. To hold to the contrary is inconsistent with fundamental principles of federalism

which permit states to define the substantive content of their own law, such as contract law and family law. This Court's decision in *Maynard v. Hill*, 125 U.S. 190 (1888), holding that states are *substantively prohibited* from treating marriage as a legally enforceable contract for purposes of the Contract Clause, is wrong and should be overruled.

The error on *Maynard v. Hill* has had serious consequences on the ability of the States to provide greater legal protection for the institution of marriage through its law of contracts, and constitutes a continuing federal interference with the states' traditional authority in the areas of family law and domestic relations, as well as contract law. The instant case is a prime example. The California court below held that, even though California law at the time that petitioner and respondent were married provided that such marriage was in fact a civil contract with legally enforceable obligations for both parties, Pet. App. 2a, the state courts were prevented from treating it as such under the Contract Clause by virtue of the decision in *Maynard*. Pet. App. A, at 3a. It is important to note that the court below did *not* hold that the marriage agreement was not a contract as a matter of California law. To the contrary, it assumed that petitioner and respondent were bound to each other under a legally valid *contract*, with enforceable rights and duties, as a matter of California law. Rather, the court below ruled as it did because it felt it was *compelled* to do so as a result of the apparent federalization of the issue in *Maynard*.[8]

We acknowledge that acceptance of petitioner's position may lead the Court to consider a revision in its Contract Clause doctrine, and to reconsider several prior decisions. However, petitioner's position is solidly grounded in the original understanding of the Contract Clause and in the

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[8] *See, e.g., State of Georgia v. Tutty*, 41 F. 753 (1890); *Marriage of Walton*, 28 Cal. App.3d 108 (1972); *see* cases collected at 16A C.J.S. *Constitutional Law*, § 340, 235, n.14 (1955).

Court's earliest cases interpreting it, including Chief Justice Marshall's landmark holding in the *Dartmouth College* case. In that opinion, Marshall noted (and reserved) the precise issue that this case presents for review:

> When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

17 U.S. (4 Wheat.) at 629. That occasion has now arrived, and we believe that it is "time enough" to restore the original meaning of the Contract Clause to marriages entered into prior to the enactment of legislation enabling non-consensual retroactive impairment of those marriage contracts.

We proceed in two steps: First of all, we look at the original meaning of the Contract Clause, and endeavor to show that its original meaning, and proper interpretation today, is to prohibit retroactive state legislation that impairs vested contractual rights, by transferring all or part of the benefit of a bargain to one party or another. Second, we argue that there is no reason in logic, history, or text for treating marriage contracts as an exception to the scope of the contract clause, if *state* law at the time of the marriage chose to accord marriage the legal status of a contract; and that the decision in *Maynard v. Hill*, to the extent it suggests the contrary, is wrong and should now be overruled.

A. The Contract Clause Prohibits All Retroactive State Legislation Impairing Vested Contractual Rights.

Properly construed, the Contract Clause of the Constitution, U.S. Const. Art. I, § 10, cl. 1, prohibits retroactive state legislation that impairs vested contractual rights by transferring all or part of the benefit of a bargain from one contracting party to another. Recent scholarship shows that this was the original meaning and purpose of the Contracts Clause, its contemporary understanding,

and the uniform interpretation of this Court for the first 150 years of Nation's existence. Kmiec & McGinnis, *supra*.[9]

The words of the Contract Clause are straightforward and unequivocal: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." The clause is phrased in absolute terms: states may not pass *any* law impairing contractual obligations. Moreover, the context in which the clause appears in the Constitution, and the surrounding prohibitions, indicate that the words mean what they say. Article I, section 10 of the Constitution is a compendium of restrictions on the legislative powers of states. Pet. App. G. The word "any" appears throughout, preceding the type of "law" or action that is forbidden. The absolute nature of the prohibition is clear in each instance where it appears. Where exceptions are intended, they are explicitly made. If the word "any" in the Contract Clause is not read as absolute, it is difficult to maintain that the other prohibitions of section 10 in which the word "any" appears are absolute either. But can it be imagined that the prohibition on States entering into *any* Treaty, Alliance, or Confederation is not absolute? The word "any" governs, in the same sentence, the prohibition on passing a Bill of Attainder, an ex post facto law, or a law impairing contractual obligations. If the word admits of a "balancing" analysis, then evidently states may pass *some* bills of attainder or ex post facto laws, where the need is deemed sufficient. *Contra United States v. Lovett*, 328 U.S. 303 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). The proposition is too extravagant to be maintained. The word "any" governs all

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[9] *See generally* McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267 (1988); Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 Case W. Res. L. Rev. 597 (1987); Palmer, *Obligations of Contracts: Intent and Distortion*, 37 Case W. Res. L. Rev. 631 (1987); Note, *A Procedural Approach to the Contract Clause*, 93 Yale L.J. 918 (1984).

three prohibitions alike, and does not admit of being "balanced" out of the Constitution by shifting policy preferences of legislatures or courts.[10] As the language of other provisions of section 10 makes clear, where the Framers intended to provide exceptions to the absolute prohibition created by use of the word "any," they knew how to say so. U.S. Const. Art. I, § 10, cl. 2 ("without the consent of the Congress"); *id.* ("except what may be absolutely necessary"); Art. I, § 10, cl. 3 ("without the Consent of Congress") *Id.*. ("unless actually invaded, or in such imminent Danger as will not admit of delay."). The absence of such qualifying or excepting language from any of the prohibitions of the first paragraph of Article I, section 10, reinforces the plain sense of the language: States are prohibited from passing *any* such law.

The context in which the Contract Clause appears also reinforces its evident character as a prohibition of *retroactive* legislation. One of the foremost concerns of the Federalist framers of the Constitution was the instability and mutability of the laws of the states—especially laws that thwarted the ability of citizens to plan their future conduct. This was also a fundamental concern of ordered liberty: persons must not be subjected to punishment or civil privations merely for being who they are or be singled out for legislative punishment (the Bill of Attainder clause); nor should persons be subject to criminal punishments for conduct lawful when undertaken (the Ex Post Facto clause); nor should persons' contractual agreements be subjected to legislative rewriting after-the-fact. The Contract Clause was not so much a singling-out of a special right, but part of a unified conception of *the rule of law*: legislation must be prospective, general, and predictable, so that citizens can plan their affairs in accordance with the laws. *See The Federalist* #44 at 227

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[10] *See Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 743-744 (7th Cir. 1987) (opinion of Posner and Easterbrook, JJ.) ("[t]he Supreme Court . . . has rewritten the contract clause, by inserting the word 'unreasonably' before impairing").

(Madison) (G. Wills ed. 1982) ("Bills of Attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation."); J. Locke, *Second Treatise on Civil Government* 377 (Laslett ed. 1980) (emphasizing need for "settled standing laws"). *See generally* Kmiec & McGinnis, *supra*, at 527-29 (colleting and discussing authorities).[11]

The early decisions of this Court confirm the plain meaning of the Contract Clause as a sweeping and complete prohibition on state legislation retroactively impairing contractual obligations. In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), the Court struck down Georgia's revocation of a public contract, in the form of a land grant, made by a previous legislature. Rejecting any limited reading of the Contract Clause, the Court, through Chief Justice John Marshall, wrote that the words of the clause are "general, and are applicable to *contracts of every description.*" *Id.* at 137 (emphasis added). The Court also rejected an argument that would have undercut the absolute character of the Clause. *Id.* at 133-34.[12] Similarly, in *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), the Court invalidated a state law which discharged a debt owing on a contract made before the law was passed. Again, Chief Justice Marshall emphasized the general language of the Clause:

> No men would use terms embracing a whole class of laws, for the purpose of designating a single in-

[11] The records of the Constitutional Convention, and of ratification debates, confirm this meaning of the Contract Clause. On August 28, 1787, Rufus King moved to add to a provision already prohibiting bills of attainder and ex post facto laws, a provision banning interference with contracts, along the lines of the Northwest Ordinance. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1911) at 439 (hereinafter "Farrand"); *see generally* Kmiec & McGinnis, *supra*, at 529.

[12] The argument had been raised that the prior land grant was tainted with fraud, and that the revocation was therefore justified. The Court rejected this argument.

> dividual of that class. No Court can be justified in restricting such comprehensive words to a particular mischief to which no allusion is made. *The fair, and we think, the necessary, construction of the sentence requires, that we should give these words their full and obvious meaning.* . . . The Convention appears to have intended to establish a great principle, that contracts should be inviolable.

Id. at 205-06 (emphasis added). And in the famous case of *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Marshall's opinion for the Court again struck down state legislation changing the charter of Dartmouth College, emphasizing the breadth of the term "contract" and the clause's sweeping and absolute character:

> It is not enough to say, that this particular case was not in the mind of the Convention when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception.

Id. at 644.

Finally, in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), the Court clarified an important limitation on the scope of the Contract Clause, holding that the clause prohibits impairments of contractual obligations so long as those obligations existed as a consequence of the operation of positive law *at the time the contract was made*; that is, the Contract Clause forbids only *retroactive* legislation impairing *vested* rights under a State's previous law of contracts.

The original meaning of the Contract Clause is thus well-attested by the natural and obvious sense of the text of the clause itself, the context in which it appears with other absolute constitutional prohibitions of retroactive legislation in conflict with Federalist notions of the rule of law, evidence of its understanding by the Framers and

Ratifiers of the Constitution, and its early contemporaneous application by this Court. Unfortunately, the original meaning of the clause fell strangely out of favor in a series of more recent cases. *See, e.g., Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (upholding debtor relief legislation); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (invalidating state abrogation of a bond contract, but introducing "balancing" analysis); *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978) (invalidating legislation impairing contract but using balancing analysis); *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) (upholding statute that directly prohibited compliance with a contract term). In *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), the Court rejected a Contract Clause challenge with words showing how far the Court has strayed from its earlier decisions: "[I]t is well-settled that the prohibition against impairing the obligation of contracts is not to be read literally." *Id.* at 1251. Rather, contract impairments may be justified where a "strong public interest" is deemed to "transcend any private agreement between contracting parties." *Id.* at 1252.

The balancing analysis of *Keystone Bituminous Coal* cannot be squared with the words of the Constitution. Furthermore, *ad hoc* balancing completely frustrates the rule-of-law purposes underlying the Contract Clause, providing certainty to those who enter into contracts, and replaces it with an imprecisely-weighted, functionally unadministrable balancing test. Those who enter into contracts as a practical matter cannot know how courts will conduct their after-the-fact balancing of public policy interests against the severity of contractual impairment in a particular case; therefore, the present approach is irreconcilable with the values of prospectivity, generality, and predictability that formed the basis for the prohibitions of Article I, Section 10, Clause 1 of the Constitution. It is time for this Court to reconsider, and correct, these recent cases.

B. This Court's Decision in *Maynard v. Hill* (1888) Wrongly Establishes a "Federal Common Law" of Contracts Preventing States from According to the Institution of Marriage the Status of a Legally Binding Contract Within the Purview of the Contract Clause.

The Contract Clause was not intended to create a federal law of contracts; rather, it simply provided that, where applicable law provided legal protection or status to a relationship or transaction under the law of contracts, states could not subsequently enact legislation retroactively abrogating contract rights already acquired. While perhaps primarily concerned with economic relationships, the clause did not (and does not) by its terms exclude from its purview contracts of any particular type, such as marriage, and there is no reason in text, logic, or history for treating marriage contracts as a judicially-implied exception to the scope of the Contract Clause, where *state* law at the time of the marriage treated marriage as a legally binding contract. *See Sturges*, 17 U.S. (4 Wheat.) at 205-06 (Contract Clause uses "terms embracing a whole class of laws" and such "comprehensive words" cannot be restricted to "particular mischief"); *Dartmouth College*, 17 U.S. (4 Wheat.) at 644. Indeed, as Chief Justice Marshall recognized in the great case of *Dartmouth College*:

> It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. . . . *The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.*

Id. at 644 (emphasis added). The Court in *Dartmouth College* did not regard marriage contracts as such an

exception, but regarded them as within the bounds of the clause.

In the case of *Maynard v. Hill*, 125 U.S. 190 (1888), however, the Court deviated from this view and instead created what amounts to a "federal common law" of contracts that *substantively prohibits* states from according marriage the same legal protection as a contract that states accord business or economic relationships. The court below relied on *Maynard* as "supreme law" (Pet. App. A, at 3a) precluding consideration of petitioner's Contract Clause claim. The reliance of lower courts on this decision—which we will show to be plainly in error—and the consequent interference with States' ability to fashion their own domestic law concerning marital and family relationships, requires this Court's review and correction.[13] The Court considered plaintiffs' contention that the legislatively-granted divorce violated the Contract Clause. The Court assumed "that the prohibition of the federal Constitution against the impairment of contracts by state legislation applies equally . . . to legislation by territorial legislatures," *id.* at 210, and concluded "that marriage is not a contract within the meaning of the prohibition." *Id.*

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[13] *Maynard* involved the question whether an 1852 act of the territorial legislature of Oregon declaring a divorce between David Maynard and his wife, Lydia Maynard, was valid to defeat otherwise valid property claims that Lydia Maynard possessed by virtue of the marriage. The couple was married in 1828 in Vermont and later moved to Ohio. In 1850, the husband left his family in Ohio and started overland for California, promising his wife he would either return or send for her within two years. He left her without any support and never returned, settling in Oregon territory and claiming, as a married man, a tract of land of 640 acres under a federal land grant. The territorial legislature granted him a divorce, without notice to his wife and without a showing of cause, and Mr. Maynard subsequently remarried. The question of the validity of the divorce after the death of the principal parties determined the subsequent rights of children from Maynard's first marriage (the plaintiffs) to half of the 640 acre tract. *Maynard*, 125 U.S. at 191-195.

The Court in *Maynard* cited only one federal court case in support of its holding—the *Dartmouth College* case. The Court quoted Chief Justice Marshall for the proposition that the Contract Clause " 'has never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces.' " *Id.* at 210, *quoting Dartmouth College*, 17 U.S. (4 Wheat.) at 629. This quotation, however, is taken badly out of context. Considered as a whole, the position of Marshall, for the Court, in *Dartmouth College* does not support the Court's holding in *Maynard*, as the very next two sentences of Marshall's opinion reveal. The full quotation is as follows:

> The provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. *Those acts enable some tribunals, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire, whether such an act be constitutional.*

Dartmouth College, 17 U.S. (4 Wheat.) at 629 (emphasis added). Thus, quite to the contrary of the *Maynard* Court's reading, Chief Justice Marshall's *Dartmouth College* dictum reflects the view (though technically reserving decision on the proposition) that state legislation retroactively abrogating the obligation of marriage contracts, either by annulling them all, or by making them voidable at the election of only one of the parties (the situation presented by the instant case) *is not excluded from the purview of the Contract Clause and likely should be understood as legislation unconstitutionally im-*

pairing the obligation of contracts. Taken in its full context, it is evident that a marriage contract certainly may be one "respect[ing] property" or, more generally, "some object of value." [14] Given the Marshall Court's clear view of the *generality* of the Contract Clause, it is inappropriate to read *Dartmouth College* as support for the proposition that marriage, where a contract under applicable state law, nonetheless can never be a contract obtaining the rule-of-law protections of the Contract Clause. But that, nonetheless, is the error inaugurated by *Maynard v. Hill* and left uncorrected to this day.

Maynard also misrepresents the views of Justice Joseph Story, who wrote separately in *Dartmouth College.* Referencing Story's work on Conflict of Laws, the *Maynard* opinion first acknowledges Story's treatment of a marriage as a contract, but also notes his discussion that it is "'more than a mere contract.'" It is "'an institution of society, founded upon consent of the parties, and in this view it has some peculiarities in its nature, character, operation and extent of obligation, different from what belong to ordinary contracts.'" *Maynard*, 125 U.S. at 213-214 (quoting Story). It is strange that the *Maynard* Court would view these passages as support for its conclusion. Story's argument that marriage is *also* a fundamental social institution giving rise to *additional* obligations beyond the terms of the

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[14] For example, prenuptial agreements (more frequent today than in the nineteenth century) generally involve property or things of value, in the conventional sense of the terms. Indeed, a marriage without a prenuptial agreement usually includes promises by the parties endowing the other with rights to the property of the promisor (as specified by state law at the time of the marriage). *See* California Civil Code Section 5100 ("Husband and wife contract toward each other obligations of mutual respect, fidelity, *and support.*" (Emphasis added). Moreover, even putting to one side the obvious financial aspects of marriage, it is difficult to believe that the *Dartmouth College* Court would not have considered marriage itself an "object of value." *See Dartmouth College*, 17 U.S. (4 Wheat.) at 696 (Story, J., concurring) (". . . marriage is always in law a valuable consideration for a contract. . .").

marriage contract—that is, marriage is "more than" a contract—cannot remotely be taken to imply that marriage is *less than* a contract. The existence of additional obligations attaching to society's interest in marriage as a *status* should not be taken to deny or disparage the basic obligations attaching to marriage as a *contract*. The *Maynard* Court's misinterpretation of Story is most illogical.

Moreover, the *Maynard* Court completely ignores Justice Story's straightforward treatment of marriage *as a contract within the meaning of the Contract Clause* in his separate opinion in the *Dartmouth College* case itself. Because of the importance of Justice Story's views to the instant case, the relevant portions of his concurring opinion are set forth in full:

> A general law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract. It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligation of the contract. Could a law, compelling specific performance, by giving a new remedy, be justly deemed an excess of legislative power? Thus far the contract of marriage has been considered with reference to general laws regulating divorces upon breaches of that contract. *But if the argument means to assert, that the legislative power to dissolve such a contract, without such a breach on either side, against the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution.* If under the faith of existing laws a contract of marriage be duly solemnized, or a marriage settlement be made (and marriage is always in law a valuable consideration for

> a contract), it is not easy to perceive why a dissolution of its obligations, *without any default or assent of the parties*, may not as well fall within the prohibition as any other contract for valuable consideration. (Emphasis added).

Dartmouth College, 17 U.S. (4 Wheat.), at 696. This view is completely in accord with the Court's suggestion in *Dartmouth College* that legislative acts "annulling all marriage contracts, or allowing either party to annul it, without the consent of the other," fall within the scope of the Contract Clause's prohibition, *Id.* at 629. *See also* 2 Story, *Constitutional Law* at 255-56 (5th ed. 1891) (any law "which makes the contract wholly invalid, or extinguishes, or releases it, is a law impairing it.").

It should also be noted that application of the Contract Clause to forbid retroactive abrogation of obligations arising under marriage contracts *does not* "restrict the general right of the legislature to legislate on the subject of divorces." *Dartmouth College*, 17 U.S. (4 Wheat.), at 629. Plainly, the next two sentences of *Dartmouth College* show that the Court understood that the clause could be applied to forbid *retroactive* impairment of marriage contracts without interfering with legislative power because the Court viewed divorce as a *remedy* for *breach* of a marriage contract. The Court indicated that the Contract Clause did not disable legislatures from providing such remedies: "These acts enable some tribunals, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other." *Id.* at 629; (Story, J., concurring, *Id.* at 695-96.

In addition, the *Contract Clause* does not limit the ability of legislatures to enact laws of *prospective* application concerning the standards to be applied by courts in granting divorces. The legislature is entitled to enact constitutionally appropriate legislation prescribing the terms on which marriages and divorces are to be recognized—so long as such legislation is *prospective* in its application and does not abrogate marriage agreements having the status of a contract under the governing stat-

utes at the time the marriage contract was made. However, California is *not* free, under the Contract Clause, to *impose such a legal regime retroactively*, so as to impair vested rights acquired earlier by a legally enforceable contract.

The remainder of the cases relied on by the Court in *Maynard* are state cases interpreting state law. *See id.* at 210-214. The general tenor of these is that marriage is "something more" than a mere contract—along the lines noted by Justice Story. As argued above, it does not follow logically that because marriage may be "something more" than a contract that it is also "something less" than a contract—that the contract *component* of marriage is not protected by the Constitution. Moreover, the *most* that the state cases can be read to support is the conclusion that marriage is not, strictly speaking, a contract *under the law of those states.* But it is a long leap from the proposition that some states do not in fact treat marriage as a contract under their substantive law of contracts to the conclusion that marriage *cannot be* a contract within the meaning of the Contract Clause, no matter what a state's law says about it. In essence, what *Maynard v. Hill* did was transform selected state decisional law into a "federal common law" of contracts—excluding certain types of agreements from the protection of the Constitution.

Such an approach, we submit, is deeply flawed. It is contrary to the original understanding of the Contract Clause and contrary to basic principles of federalism. The Contract Clause does not create a federal common law of contracts, but a federal constitutional bar against retroactive interference with agreements having the status of contracts *as a matter of state law.* Petitioner's position is straightforward: whether marriage is a legal contract with legally enforceably rights and responsibilities is first and foremost a matter of *state* law. If a state's law establishes that marriage is such a contract, it is no business of the federal courts to nullify that determination in the name of the Contract Clause. To

the contrary, if a state's law provides that marriage is a legally binding contract with enforceable rights and responsibilities of both contracting parties, the Contract Clause prevents a state from subsequently enacting retroactive legislation that reassigns those rights and responsibilities to the unilateral decision of one or the other of the parties.[15]

California courts may well choose to interpret their previous state law as not in fact treating marriages as contracts. This they are free to do (so long as such an interpretation does not constitute a pretext for evasion of the necessary minimum meaning of the Contract Clause, *see* n.15 *supra*). That is not a question for this

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[15] Of course, whether or not there exists an "obligation of contract" within the meaning of the Contract Clause is ultimately a question of federal constitutional law. But the underlying state substantive law of contracts is a question "primarily of state law" to which this Court accords "respectful consideration and great weight" to state law treatment. *Indiana* ex rel. *Anderson v. Brand*, 303 U.S. 95, 100 (1938); *see also Ogden v. Saunders*, 25 U.S. (12 Wheat.) at 259 (Washington, J.) ("It is, then, the municipal law of the state . . . which is empathically the law of the contract made within the State . . ."). This seems especially appropriate where state law *recognizes* a relationship as a contract—thereby bringing into play the Contract Clause as a limitation on that State's power—rather than seeks to *deny* the existence of a contract in a potentially self-serving manner. It is to address the latter type of situation—"in order that a constitutional mandate may not become a dead letter," *Brand*, 303 U.S. at 100—that this Court will examine the *bona fides* of state law determinations that certain agreements are not contracts. The very existence of the Contract Clause implicitly prevents a State from defining its law of contracts so as to completely *avoid* application of the clause or drastically limit the sphere of its applicability. A state statute that "defined" that state's contract law out of the Contract Clause would be an obviously unconstitutional attempt to statutorily repeal the Contract Clause. *Cf.* Kmiec & McGinnis, *supra*, at 558, n.139. Thus, while this Court has found certain relationships to be "contracts" within the meaning of the Constitution that state law evidently had attempted to avoid treating as such, *see, e.g., Dartmouth College*, 17 U.S. (4 Wheat.) 518; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, there is no comparable practice of finding concededly state law contracts not to be covered by the Contract Clause, at least not until *Maynard*.

Court, but one, in the first instance, of California law. But the court below, following this Court's decision in *Maynard*, felt itself *prevented*, as a matter of *federal* law, from even addressing that issue of state law. It is time for this Court to correct the impediment created by *Maynard*.

II. PETITIONER WAS DEPRIVED OF THE LIBERTY INTERESTS IN HIS MARRIAGE WHEN CALIFORNIA DENIED HIM A MEANINGFUL HEARING ON THE DISSOLUTION OF HIS PRE-1969 MARRIAGE, THUS VIOLATING FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS.

The Due Process Clause of the Fourteenth Amendment guarantees that "certain substantive rights—life, liberty and property cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Board of Education v. Loudermill*, 470 U.S. 539, 541 (1985).

In each Due Process challenge the threshold question is whether there is an interest to which procedural protection under the Fourteenth Amendment attaches. The subsequent question is "what process is due" before such an interest may be denied. *Morrissey v. Brewer*, 408 U.S. 471 (1972). This court has stated on numerous occasions that "'due process" unlike some legal rules, is not a technical conception with fixed content unrelated to time, place and circumstances," *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) but is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey*, 408 U.S. at 481. *See also Stanley v. Illinois*, 405 U.S. 645, 650 (1971); *Little v. Streater*, 452 U.S. 1 (1981).

The Court's has forged a three-part analysis for assessing whether particular procedures are constitutionally sufficient given the circumstances of the particular case. Although originally applied in the context of administrative denials of benefits, this three-part inquiry announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976), has informed due process jurisprudence in other contexts as

well. The following three elements are to be considered in evaluating what due process requires in a particular proceeding: the private interest that will be affected by the state action; the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 334-35.

A. The Petitioner Has a Fundamental, Liberty Interest in His Marital Relationship.

This Court has recently stated that one laying claim to a liberty interest must demonstrate not only that the interest claimed be "'fundamental' (a concept that in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society." *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Petitioner lays claim to nothing less than his interest in his marriage.

On December 31, 1962, the Petitioner and Respondent were married. The solemnization was religious. The parties publicly exchanged bilateral vows. *See* petition herein at 4. The Petitioner understood that both he and Respondent were contractually promising mutual support, not for a season but for a lifetime. Although the notion of a life-long relationship created by and grounded on promises such as these bespeaks of limitations on personal autonomy to those who seek to deconstruct the traditional notions of marriage and family,[16] this Court has recognized repeatedly the fundamental nature of marriage and its importance to the structure of an ordered society. In *Loving v. Virginia*, 388 U.S. 1

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[16] *See e.g.*, Kay, *Equality and Differences: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. Cin. L. Rev. 1 (1987); Kay, *Appraisal of California's No-Fault Divorce Law*, 75 Cal. 1. Rev. 291 (1987).

(1967) the Court affirmed that, "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* at 12. Or again as it stated in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), "[m]arriage and procreation are fundamental to the very existence and survival of the race." But perhaps, the most eloquent expression of the fundamental character of marriage came from this Court in Justice Douglas' opinion in *Griswold v. Connecticut*, in which he stated:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths, a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Douglas, J., concurring). It is marriage, so fundamental to society as to be identified with the very essence of liberty, that California denies to the Petitioner without the requisite process. Far from seeking a novel right, the petitioner is seeking the Court to affirm the essential purpose of the Due Process Clause, namely, "to prevent future generations from lightly casting aside important traditional values." *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 2341, n.2 (1989).[17]

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[17] Petitioner has other rights, not definitively and irrevocably settled, which are not yet ripened beyond an expectancy that settled arrangements under the legal separation may beneficially change upon reconciliation. By the order of dissolution of marriage, Petitioner is deprived, in quality, of fundamental familial relationships that could be restored by reconciliation. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (the right to conceive and raise children is "essential" to the very nature of human existence); *May v. Anderson*, 345 U.S. 528 (1953) (parental rights are "far more precious . . . than property rights."); *Santosky v. Kramer*, 455 U.S. 745 (1982) (parental custody is a fundamental liberty interest).

B. The Procedures Afforded Petitioner Resulted in the Deprivation of his Interests.

James Sutherland received notice of the commencement of the dissolution proceeding. He answered by asserting that there was a reasonable possibility of reconciliation. At the hearing, Bronte Sutherland testified that there existed "irreconcilable differences" between the parties. The judge then reluctantly allowed a very brief cross-examination of the Respondent and very brief testimony by the Petitioner, the substance of which was that contrary to the contention of the Respondent, there were no irreconcilable differences resulting in an irremedial breakdown of the marriage.

The court, following the requirements established by the California legislature, reduced the judicial proceeding to nothing more than a ministerial act. The trial judge's conclusion of "irreconcilable differences" under these facts follows the direction provided by the California legislature when it adopted the Family Law Act in 1969 and later amended the Act in 1975. The Assembly Report provides that "absolute refusal to live together despite conciliatory attitude on the part of one party is thought to be a sufficient reason for dissolution." Assembly Report 8057.[18] The judge's conclusion and lack of willing-

[18] However, the California legislature was inconsistent: while the Assembly Report affirmed a unilateral ability of one party to terminate the marriage, it, at the same time, affirmed that "by requiring the consideration of the marriage as a whole and making the possibility of reconciliation the important issue the intent is to induce reconciliation and an uncharged atmosphere which will facilitate resolution of other issues and perhaps effect a reconciliation." Assembly Report 8058. In short, while the Assembly by passage of the Family Law Act was attempting to cure some perceived ills of prior domestic relations law, it was seeking its cure of those ills while keeping reconciliation of the marital relationship at the heart of its policy concerns. None of this official concern for reconciliation was evident in the Petitioner's hearing.

For the litany of social ills that "no-fault" was pledged to cure, *see* Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 UCLA L. Rev. 1306 (1970) and Wardle, *supra* note — at 82-98. For a description of the host of social ills

ness to take objective evidence of irreconcilable differences also follows from the 1975 amendment of the Act. In 1975, the California legislature amended § 4509 of the Family Law Act to eliminate the court's discretionary power to hear evidence of misconduct "where it is determined by the court to be necessary to establish the existence of irreconcilable differences." The California legislature thereby rendered the judge powerless to require that a party seeking unilateral termination bear any burden of proving his or her case beyond simply answering "yes" when counsel asks the talismanic phrase "Have irreconcilable differences arisen that have resulted in the irremedial breakdown of the marriage?"

The mere assertion of irreconcilable differences created, in effect, an irrebuttable presumption that resulted in the deprivation of petitioner's fundamental liberty interest in his marriage, one founded on promises exchanged at its solemnization.

In *Santosky v. Kramer*, 455 U.S. 745 (1982) this Court held that procedural Due Process prohibits a state from depriving natural parents of their fundamental liberty interest in the custody of their children without a showing of cause by clear and convincing evidence. By contrast, here petitioner was deprived of his fundamental liberty interest in his marriage not by a showing of a clear and convincing evidence, but by the operation of an irrebuttable presumption, triggered by nothing more than the mere subjective assertion by the respondent. If it is true that a state may not directly deprive a fundamental liberty interest apart from a showing of clear and convincing evidence, it must follow that a state may not indirectly, by application of its divorce law, impair the funda-

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"no-fault" has created, see e.g. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, at 107 (1991); *The Transformation of Family Law*, *supra* note —, at n.118 (1989); *Abortion and Divorce in Western Law: America's Failures, European Challenges* (1987); Wardle, *supra* note —. Bruce C. Hafen, *Individualism and Autonomy In Family Law: The Waning of Belonging*, 1991 B.Y.U.L. Rev. 1.

mental liberty interest of a non-consenting spouse. When the parties of a marriage promise to each other mutual fidelity, respect and support for a lifetime, the state may not vitiate a non-consenting spouse's interest in the marriage by requiring only an assertion by the other spouse of irreconcilability. Procedural due process, at its "root," requires that a party standing to lose protected interests, has at the very least a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1973). The petitioner, by the implementation of the substantive criteria for divorce, has been deprived of his liberty interest in his marriage without having a meaningful opportunity to be heard.

C. California's Additional Administrative Burden Is Not Sufficient To Override Petitioner's Liberty Interest.

It is indisputable that the legislature's stated interest in reconciliation of the marital relationship is not furthered but subverted by the procedures afforded Petitioner. There is no plausible nexus between the stated interest of reconciliation and the unilateral termination of the marital relationship provided by the application of the Family Law Act to the Petitioner. The only assertable governmental interest advanced by this lack of judicial consideration and adjudication is judicial economy. However, the administrative burden on courts would likely not increase if they were required to take objective evidence of "irreconcilable differences" when a party does not consent to a divorce.[19]

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[19] "The belief that 'things are better now' regarding hostility in divorce litigation is perpetuated in part by the fostering of an illusion about how much hostility there was in the 'bad old days.' In fact, approximately ninety to ninety-five percent of all divorces before the adoption of no-fault grounds were uncontested. In the overwhelming majority of cases before the adoption of no-fault divorce grounds, there was no hostile litigation; there was no litigation at all." Wardle, *supra*, at 103.

Many persons, otherwise inclined to seek divorce, might well forego divorce proceedings if a *bona fide* contest was possible, and might instead pursue reconciliation. In any event, the potential increase in the administrative burden can in no way justify the denial of the fundamental liberty interest asserted by the Petitioner.

The Constitution protects Petitioner's liberty interests by providing a structural framework that expressly limits what states can do. This structural limitation is entitled to greater weight than any alleged state administrative burden.

Chief Justice Marshall and Justice Story heard the constitutional question that would require judicial attention at a later time, should states go so far as to treat divorce, not as remedy for breach, but as a unilateral annulment of the marital contract. Because they understood that the meaning and importance of marriage are fundamental to society, they answered the question, looking down the corridors of time to foresee this case. Justice Story said simply, "I leave this case, however, to be settled when it shall arise." *Dartmouth College*, 17 U.S. (4 Wheat.) 697 (1819). The Marshall Court had no basis to decide the question. This Court does.

This Court's review is essential to resolve the issue of fundamental, marital contract rights subverted by *Maynard* contrary to *Dartmouth College*. The Court, correcting its own precedent, can reverse the judgment of the court below, telling California that it cannot deprive a married person of his or her right to be married, retroactively, without consent or sufficient cause, without violating the United States Constitution, both in its Contracts and Due Process Clauses.

CONCLUSION

Petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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BRIAN H. BURKE
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January 23, 1992

APPENDICES

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

IN RE THE MARRIAGE OF BRONTE C. and JAMES P. SUTHERLAND

2d Civil No. B051649
(Super. Ct. No. 180006)
(Santa Barbara County)

BRONTE C. SUTHERLAND,
Respondent,
v.
JAMES P. SUTHERLAND,
Appellant.

[Filed Jul. 9, 1991]

Husband James P. Sutherland appeals a judgment dissolving his marriage to wife Bronte C. Sutherland. We reject husband's constitutional arguments and affirm the judgment.

FACTS

On January 2, 1990, wife Bronte C. Sutherland filed a petition to dissolve her 27-year marriage to husband James P. Sutherland. Husband answered that any differences between them were reconcilable. A prior judgment of separation divided the property of the marriage and settled child custody and spousal support.

During the hearing on the status of the marriage, wife testified there were irreconcilable differences between husband and her that marriage counseling could not resolve. She declared she was not willing to remain married to

husband. Husband testified he believed any differences between them were reconcilable because he intended to and was changing and neither God nor his marriage vows permitted divorce. The trial judge decided irreconcilable differences existed that irremediably broke down the marriage. (Civ. Code,[1] §§ 4506; 4507.)

On appeal husband contends (1) the existing no-fault divorce law impairs contractual obligations under the federal and state constitutions and (2) the hearing procedure denied him due process of law.

DISCUSSION

I.

Husband contends application of no-fault divorce law to his marriage, over his objection, unconstitutionally impairs his marriage contract. He correctly points out that marriage is, by statute, a civil contract. (§§ 4100, 5100.) He relies upon the concurring opinion of Justice Story in *The Trustees of Dartmouth College* v. *Woodward* (1819) 4 L.Ed. 629, 696-697: "A man has just as good a right to his wife as to the property acquired under a marriage contract. He has a legal right to her society and her fortune; and to divest such right without his default, and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his own estate."

The United States Supreme Court announced in *Maynard* v. *Hill* (1888) 125 U.S. 190, 210 that marriage is not a contract falling under the constitutional clause forbidding impairment of contract: "'. . . [Marriage] is more than a contract. . . . It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.'" (*Id.*, at pp. 212-213.) Although *Maynard* did not involve application of no-fault

[1] All statutory references are to the California Civil Code.

divorce law, we perceive no reason to believe a contemporary marriage contract would fall within constitutional purview.

Husband argues *Maynard* misconstrues earlier authority of *The Trustees of Dartmouth College* v. *Woodward, supra*, 4 L.Ed. 629. This may be true, but *Maynard*, nevertheless, is the supreme law, and that decision controls here. (U.S. Const., art. VI, cl. 2.)

Moreover, the state possesses a vital interest in the marriage relationship. (*In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 112.) The rights, duties and obligations of the partners are determined by law. "'. . . It was a contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the Sovereign, as evidenced by law. . . .'" (*Maynard* v. *Hill, supra*, 125 U.S. 190, 211.)

II.

Husband also argues the hearing on the breakdown of the marriage was sham and denied him due process of law. He specifically objects to a finding of irreconcilability based upon the testimony of one spouse. He adds that section 4509 prevents evidence of a party's misconduct, and thus, restricts judicial fact finding.

The Legislature did not intend the trial court to perfunctorily decide a marriage is irremediably broken down due to the parties' irreconcilable differences. (§§ 4506, 4507; *In re Marriage of McKim* (1972) 6 Cal.3d 673, 679.) Although the evidence must depend upon the subjective beliefs of each party, it is the court, not a party or the parties, that determines whether irreconcilable differences exist. (*In re Marriage of McKim, supra*, at p. 680.)

The state has no interest in forcing one spouse to remain with the other. That situation would engender bitterness and unhappiness and further no public purpose.

(*De Burgh* v. *De Burgh* (1952) 39 Cal.2d 858, 864.) The Legislature considered the refusal of one spouse to live with another, despite the objecting spouse's conciliatory overtures, to be a sufficient ground for dissolution: "It should not be difficult for the court to determine whether the parties will make serious efforts to repair the marriage rift. For example, absolute refusal on the part of one spouse to live with the other, despite a conciliatory attitude and effort on the part of the latter, was thought by the great majority of the legislators and witnesses considering the question to be a sufficient reason for dissolution. In that situation the court could hardly justify a refusal to grant an order of dissolution since the marriage certainly has broken down. Refusal would amount to a legal perpetuation of a relationship which has ceased to exist in fact." (Assem. Com. Rep. of the 1969 Divorce Reform Legislation, 4 Assem. J. (1969 Reg. Sess.) p. 8058.)

Although the trial judge was impatient with husband's testimony, he did allow husband to explain why he believed the marriage was salvageable. The trial judge then stated: "[T]he evidence is convincing that Mrs. Sutherland does not want to be married to Mr. Sutherland under any circumstances, and I call that irreconcilable."

Evidence or lack of evidence of misconduct would not necessarily advance husband's position. In view of its broad powers concerning marriage status, the Legislature could properly preclude evidence of misconduct in determining irreconcilable differences between the parties.

Accordingly, the judgment is affirmed.

Husband is to bear costs of appeal.

We concur:

GILBERT, J.

STONE, P. J.

YEGAN, J.

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

IN RE MARRIAGE OF BRONTE C. and JAMES P. SUTHERLAND

2d Civil No. B051649
(Super. Ct. No. 180006)
(Santa Barbara County)

BRONTE C. SUTHERLAND,
Respondent,

v.

JAMES P. SUTHERLAND,
Appellant.

ORDER MODIFYING OPINION AND DENYING REHEARING

[Filed Aug. 6, 1991]

THE COURT:

It is ordered that the opinion filed herein on July 9, 1991, be modified in the following particular:

On page two, the second full paragraph should be: On appeal husband contends (1) the existing no-fault divorce law impairs contractual obligations under the federal constitution, and (2) the hearing procedure denied him due process of law.

This order modifying opinion does not change the judgment.

Appellant's petition for rehearing is denied.

APPENDIX C

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 6

COUNTY CLERK'S OFFICE
Santa Barbara County
1100 Anacapa Street
Santa Barbara, CA. 93101

[Oct. 1, 1991]

RE: Sutherland, Bronte C.
vs.
Sutherland, James P.
2 Civil B051649
Santa Barbara No. 180006

* * REMITTITUR * *

[Filed Oct. 3, 1991]

I, Robert N. Wilson, Clerk of the Court of Appeal of the State of California, For the Second Appellate District, do hereby certify that the attached is a true and correct copy of the original order, opinion or decision entered in the above-entitled cause on 07/09/91 and that this order, opinion or decision has now become final.

* * AFFIRMED IN FULL. * *

Appellant To Bear Costs of Appeal.

[SEAL]

Witness my hand and the seal of the Court affixed at my office this Oct. 1, 1991.

ROBERT N. WILSON
Clerk

By: /s/ [Illegible]
Deputy Clerk

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

IN RE THE MARRIAGE OF
BRONTE C. AND JAMES P. SUTHERLAND

Second Appellate District, Division Six, No. B051649
S022504

BRONTE C. SUTHERLAND,
Respondent

v.

JAMES P. SUTHERLAND,
Appellant

[Filed Sep. 25, 1991]

Appellant's petition for review DENIED.

/s/ LUCAS
Chief Justice

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):

John Kerr Wilson, Esq.
PRICE, POSTEL & PARMA
200 East Carrillo Street
Santa Barbara, CA 93101

TELEPHONE NO.: (805) 962-0011

Attorney for (Name): Petitioner, BRONTE C. SUTHERLAND

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA BARBARA

STREET ADDRESS: 1100 Anacapa Street
MAILING ADDRESS: Same
CITY AND ZIP CODE: Santa Barbara, CA 93101
BRANCH NAME:

MARRIAGE OF
PETITIONER: BRONTE C. SUTHERLAND
RESPONDENT: JAMES P. SUTHERLAND

FOR COURT USE ONLY

FILED
SUPERIOR COURT
SANTA BARBARA
MAY 21 1990
Kenneth A. Pettit,
County Clerk-Recorder
By Deputy Clerk

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AC
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SR
AP

FQ-1
7/18/c
PP

JUDGMENT

☒ Dissolution ☐ Legal separation ☐ Nullity
☒ Status only
☐ Reserving jurisdiction over termination of marital status
Date marital status ends: 7/18/90

CASE NUMBER: 180006

1. This proceeding was heard as follows: ☐ default or uncontested ☐ by declaration under Civil Code, § 4511 ☒ contested
   a. Date: 5/18/90 Dept.: 6 Rm.:
   b. Judge (name): William L. Gordon ☐ Temporary judge
   c. ☒ Petitioner present in court ☒ Attorney present in court (name): John Kerr Wilson
   d. ☒ Respondent present in court ☒ Attorney present in court (name): Brian H. Burke
   e. ☐ Claimant present in court (name): ☐ Attorney present in court (name):
2. The court acquired jurisdiction of the respondent on (date): 1/17/90
   ☒ Respondent was served with process ☐ Respondent appeared

3. THE COURT ORDERS, GOOD CAUSE APPEARING:
   a. ☒ Judgment of dissolution be entered. Marital status is terminated and the parties are restored to the status of unmarried person
      (1) ☒ on the following date (specify): 7/18/90
      (2) ☐ on a date to be determined on noticed motion of either party or on stipulation.
   b. ☐ Judgment of legal separation be entered.
   c. ☐ Judgment of nullity be entered and the parties are declared to be unmarried persons on the ground of (specify):
4. THE COURT FURTHER ORDERS:
   a. Jurisdiction is reserved to make other and further orders necessary to carry out this judgment.
   b. ☐ Wife's former name be restored (specify):
   c. ☐ This judgment shall be entered nunc pro tunc as of (date):
   d. ☐ Jurisdiction is reserved over all other issues and all present orders remain in effect except as provided below.
   e. Any payment for spousal or family support contained in this judgment shall terminate upon the death of the payee unless otherwise provided.
   f. ☐ Other (specify):

Date: May 21, 1990.

WILLIAM L. GORDON
JUDGE OF THE SUPERIOR COURT

5. Number of pages attached: 0 ☐ Signature follows last attachment

- NOTICE -

1. Please review your will, insurance policies, retirement benefit plans, and other matters you may want to change in view of the dissolution or annulment of your marriage. Ending your marriage may automatically change a disposition made by your will to your former spouse.
2. A debt or obligation may be assigned to one party as part of the division of property and debts, but if that party does not pay the debt or obligation, the creditor may be able to collect from the other party.
3. If you fail to pay any court-ordered child support, an assignment of your wages will be obtained without further notice to you.

BEST AVAILABLE COPY

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-420

JAMES SUTHERLAND,

Petitioner

v.

BRONTE SUTHERLAND

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

January 23rd, 1992.

/s/ Sandra Day O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 12th day of December, 1991.

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION, ARTICLE ONE, SECTION TEN

1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

FOURTEENTH AMENDMENT, SECTION ONE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CIVIL CODE § 4100:

Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by the issuance of a license and solemnization as authorized by this code, except as provided by Section 4213.

§ 4506. Grounds for dissolution or legal separation

A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

(1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.

(2) Incurable insanity.

(Added by Stats.1969, c. 1608, p. 3324, § 8, operative Jan. 1, 1970.)

§ 4507. Irreconcilable differences defined

Irreconcilable differences are those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved.

(Added by Stats.1969, c. 1608, p. 3324, § 8, operative Jan. 1, 1970.)

§ 4508. Irreconcilable differences; findings; order; continuance for reconciliation; consent to legal separation

(a) If from the evidence at the hearing the court finds that there are irreconcilable differences, which have caused the irremediable breakdown of the marriage, it shall order the dissolution of the marriage or a legal sepa-

ration. If it appears that there is a reasonable possibility of reconciliation, the court shall continue the proceeding for a period not to exceed 30 days. During the period of the continuance, the court may make any order for the support and maintenance of the parties, the custody, support, maintenance, and education of the minor children of the marriage, attorney fees, and for the preservation of the property of the parties. At any time after the termination of such 30-day period, either party may move for the dissolution of the marriage or a legal separation, and the court may enter its judgment decreeing such dissolution or separation.

(b) . . .

(Added by Stats.1969, c. 1608, p. 3324, § 8, operative Jan. 1, 1970. Amended by Stats.1974, c. 487, p. 1047, § 2.)

§ 4509. Evidence of specific acts of misconduct

In any pleadings or proceedings for legal separation or dissolution of marriage under this part, including depositions and discovery proceedings, evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to that issue.

(Added by Stats.1969, c. 1608, p. 3325, § 8, operative Jan. 1, 1970. Amended by Stats.1969, c. 1609, p. 3355, § 14, operative Jan. 1, 1970; Stats.1975, c. 35, p. 59, § 1.)

§ 5100:

Husband and wife contract toward each other obligations of mutual respect, fidelity, and support.